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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 422

GILLIGAN, WILL & CO., a Partnership, JAMES GILLIGAN and WILLIAM WILL,

Petitioners,

against

SECURITIES AND EXCHANGE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MANNING, HOLLINGER & SHEA,
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FRANCIS J. PURCELL,
Of Counsel.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	4
Reasons for Granting the Writ	7
Conclusion	10

CITATIONS

Securities and Exchange Commission *v.* Ralston Purina Company, 346 U. S. 119	7, 8, 9
Securities and Exchange Commission *v.* Sunbeam Gold Mining Co., 95 F. 2nd 699	9
Securities and Exchange Commission *v.* Otis & Co., 338 U. S. 843	7
Federal Communications Commission *v.* Broadcasting Service Organization, Inc., 337 U. S. 901	7
McCandlass *v.* Furland, 296 U. S. 140	8
Upshaw *v.* United States, 335 U. S. 410	8

STATUTES:

Securities Act of 1933, as amended: (15 U. S. C. § 77(a) *et seq.*)	
Section 2(11)	2, 7, 8, 9
Section 4(1)	2, 7, 8, 9
Section 5(a)	3
Section 5(b)	3
Section 5(c)	3
Securities Exchange Act of 1934: (15 U. S. C. § 78(o))	
Section 15A(b)(4)	4

MISCELLANEOUS:

H. Rep. No. 85, 73rd Cong., 1st Sess. 1933	9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered June 25, 1959, which affirmed an order entered on May 7, 1958 by the United States Securities and Exchange Commission.

Opinion Below

The opinion of the Court of Appeals (See Appendix A, pp. 1a-14a) is not yet officially reported. The opinion of the Securities and Exchange Commission (See Record, pp. 21a-33a) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 25, 1959 (See Appendix A, p. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

Question Presented

Whether the sale of securities, previously purchased from an issuer, to three sophisticated purchasers, one no more than an offeree, for investment, constitutes a distribution or public offering, thereby constituting the seller an underwriter within the definition in Section 2(11) of the Securities Act of 1933, as amended.

Statute Involved

The following provisions of the Securities Act of 1933, 48 Stat. 74, as amended 48 Stat. 906, 15 U.S.C. 77a, *et seq.*, are pertinent:

Sec. 2(11) Securities Act of 1933

Sec. 2. When used in this title, unless the context otherwise requires—

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

Sec. 4. The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter or dealer; transactions by an issuer not involving any public offering; • • •

• • • • • •

[15 U.S.C. 77d]

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments

of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

Statement

This proceeding was instituted by the Securities and Exchange Commission pursuant to Section 15 of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78(O) to determine whether the Petitioner-Registrant had violated the 1933 Act and whether Gilligan, Will & Co.'s registration as a broker dealer under the 1934 Act should be revoked; whether to suspend or expel Registrant from membership in the National Association of Securities Dealers, Inc., and whether under Section 15A(b)(4) of the 1934 Act, James Gilligan ("Gilligan") and William Will ("Will") were each a cause of any revocation, suspension or expulsion which might be ordered. The facts were stipulated, a hearing was waived and the Commission heard oral argument. The Commission thereafter ordered that Registrant be suspended from membership in the National Association of Securities Dealers, Inc. for a period of five days and found Gilligan and Will each to be a cause of its order. The Court below affirmed (Appendix A, p. 14a).

On July 6, 1955, Edward L. Elliott ("Elliott"), a partner in the brokerage firm of Elliott & Company, agreed with The Crowell-Collier Publishing Company ("Crowell-Collier") that he would undertake to place privately without registration under the 1933 Act, $3,000,000 of 5% convertible debentures of Crowell-Collier, convertible immediately into common stock at $5.00 per share. On or about July 6, Elliott

advised Gilligan of the foregoing agreement and in addition advised him that White & Case, the attorneys for Crowell-Collier, had stated that the placement was an exempt transaction; that Elliott's attorney had also so stated; that Crowell-Collier had "turned the corner" and was then operating on a profitable basis; that Mrs. Elliott was taking 500,000 of these debentures and that Gilligan could purchase as much of the balance as he desired, and that Elliott was then going to sell as much as was left to certain of his friends. Gilligan for his own account agreed to purchase $100,000 of the debentures. Gilligan was advised by Elliott and he understood that whatever amount he purchased would have to be acquired for investment and on or about August 10, 1955, when the debentures were delivered to the Registrant and while Gilligan was on vacation, an investment letter was signed by Will on behalf of the Registrant.

Subsequent to his agreement to purchase the said debentures, Gilligan told one, Louis Alter, a member of the American Stock Exchange and a specialist on the floor thereof, and a long time friend of Gilligan's that he could have $45,000 of the debentures. Upon accepting the confirmation of this purchase, Alter likewise signed an investment letter. Gilligan also offered $10,000 of his subscription to another friend, which sale was not consummated. On or about July 7, 1955, one Michael D. Mooney, the General Counsel of the American Stock Exchange, had requested of Gilligan that he be permitted to buy $5,000 of the debentures to which Gilligan replied that there were "none available." However, some time in August, after the aforementioned $10,000 participation did not materialize, Gilligan advised Mooney that he could have $5,000 of the debentures, which Mooney purchased.

Upon returning from his vacation in early September, 1955, Gilligan found that the debentures had been delivered to the Registrant, and thereupon distributed the debentures

as follows: To Gilligan, $45,000; to Alter $45,000; to Mooney $5,000 and $5,000 to the Registrant's trading account. Each purchaser signed a statement attesting to the fact that the debentures were being purchased for investment.

In May, 1956, after months of waiting and observing the quantity of advertising in the various publications of Crowell-Collier, Gilligan noted that there was no increase and thereupon decided to convert his debentures into common stock and sell the stock. He advised Alter of his plans and on May 15th Registrant, Gilligan and Alter converted their debentures into common stock. Later in May, the Registrant and Gilligan sold their stock on the American Stock Exchange and Alter sold a portion of his. In the latter part of May, 1956, Elliott told Gilligan that he was surrendering to Crowell-Collier his option on the remaining $1,000,000 of debentures and that these debentures were to be sold at 160% of par based on the stock's price at that time of $8.00 per share. The proceeds of the sale were to be used by Crowell-Collier in the acquisition of certain television stations which it was said would show a profit of $4,000,000 annually. Gilligan agreed to take $150,000 face amount of debentures and stated he would find out whether Alter was interested in taking any. After Alter indicated that he wanted $50,000 face amount Gilligan advised Elliott that the total subscription would be $250,000. On May 29, 1956, the Registrant subscribed to $200,000 face amount of debentures, $50,000 of which were confirmed to Alter and $150,000 to a joint specialist account managed by Registrant and Lloyd E. Howard. All of these debentures were immediateley converted into stock, all of which shares are still held.

Later in May, 1956, Elliott informed Gilligan that $200,000 of debentures were still unsold and that it was necessary to sell these debentures to one party and that if Gilligan could find a purchaser, Elliott would sell him

$50,000 stock purchase warrants at 1¢ each. Gilligan contacted Harry Harris and told him that he would split his warrants with him if he, Harris, could find a purchaser for the debentures. Harris interested Value Line Special Institution Fund, Inc., and on May 29, 1956, the Fund's representatives met with Crowell-Collier's President, Paul Smith, and Harris and Elliott and the Fund later agreed to purchase $200,000 face amount of debentures and 15,000 warrants. To accommodate Elliott, Registrant, as principal, sent a confirmation signed by Will covering the sale of the debentures to the Fund. The Fund, at the request of Registrant, signed investment letters covering the debentures and the warrants.

Reasons for Granting the Writ

It is our position that a conflict exists betwen the decision of the Court of Appeals in this case and the decision of this Court in *Securities and Exchange Commission* v. *Ralston Purina Company*, 346 U. S. 119 (1953), in that the lower Court misconstrued and in part ignored the full standard as set by this Court for determining what is a public offering or distribution. This court has held that lower courts are precluded from ignoring its decisions in whole or in part and must construe the law with due knowledge and application thereof. *The Securities and Exchange Commission* v. *Otis & Co.*, 338 U. S. 843; *Federal Communications Commission* v. *Broadcasting Service Organization, Inc.*, 337 U. S. 901. The *Purina* case defined the test to be applied in determining whether an issue of securities was a public offering or distribution and as such, not exempt from the registration provisions, under the second clause of Section 4(1) of the 1933 Act.

The Petitioners here had urged in the lower Court that the limited resales made as admitted, did not amount to a distribution or public offering within the standard set forth in the *Purina* case and therefore Petitioners were not underwriters and their resales were exempt from the regis-

tration requirements pursuant to the first clause of Section 4(1) of the 1933 Act. The lower Court reached the conclusion "that the resales" by Petitioners were "themselves a distribution or public offering" and therefore not exempt, as claimed (Appendix A, p. 9a). In supporting its conclusion in this respect, the lower Court paraphrased the test or standard of the *Purina* case by stating that the "governing fact" in determining a public offering "is whether the persons to whom the offering is made are in such a position with respect to the issuer that they either actually have such information as a registration would have disclosed, or have access to such information" (Appendix A, p. 9a) (346 U. S. 125-127). However, the lower Court chose to ignore or close its eyes to another equally clear, important and pertinent holding of the *Purina case* expressed in the following language of this Court:

> "'The natural way to interpret the private offering exemption is in the light of the statutory purpose. Since exempt transactions are those as to which "there is no practical need for (the bill's) application," *the applicability of §4(1) should turn on whether a particular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering."*'" (Emphasis ours) (346 U. S. 124-125)

It is submitted that in reading out of the *Purina* case the "fend for themselves" qualification placed by this Court on its broad test of a public offering, the lower court at the same time misconstrued the overall meaning of this Court's interpretation of the term public offering as well as the exemptive provisions of Section 4(1); *McCandlass* v. *Furland*, 296 U. S. 140; *Upshaw* v. *United States*, 335 U. S. 410.

Furthermore, the lower Court misconstrued the public offering test of the *Purina* case for by its own interpreta-

tion of that decision, the exemption could only be available as to sales made to persons who either actually have such information as a registration would disclose or to those having access to such information. Thus, upon deciding from the facts that the three buyers from Registrant (Alter, Mooney and the Registrant's firm account) did not actually have such information or access thereto, the lower Court dispensed with the standard as qualified in the *Purina* case. By excluding the third group of offerees (those able to fend for themselves) who would constitute a class of persons which by reason of the aforesaid special circumstances did not require the protection of the 1933 Act (*Securities and Exchange Commission* v. *Sunbeam Gold Mining Co.*, 95 F. 2nd 699), and as defined in the *Purina* case, to whom sales may be made which would be exempt, the lower Court not only failed to properly construe the full standard of the *Purina* case and apply it fairly in the instant circumstances, but also may be said to have narrowed the availability of the exemptions in Section 4(1) to a point not intended by the Supreme Court in its interpretation of the statutory purpose. In the latter connection the House Report No. 85, 73d Cong. 1st Session, 1933 should be noted wherein it is stated that the private transaction or no distribution exemption was intended to apply to "isolated sales of securities."

The question of whether a person who may purchase from an issuer and resell only to a limited number of persons able to fend for themselves is at the same time an underwriter, as defined in the statute, is not an infrequent question, and one as to which there is no *stari decisis* other than that found in the *Purina* case. The interpretation of the lower Court should not be left to stand as substantially reducing the standard of the *Purina* case for determining the availability of the exemptions from registration contained in the first and second clauses of Section 4(1).

CONCLUSION

Since the opinion of the Court below apears to be in conflict with the opinion of this Court this petition for certiorari should be granted.

Respectfully submitted,

MANNING, HOLLINGER & SHEA,
Attorneys for Petitioners.

FRANCIS J. PURCELL,
Of Counsel.

SEPTEMBER 1959.

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 117—October Term, 1958.

(Argued January 15, 1959 Decided June 3, 1959.)

Docket No. 25171

GILLIGAN, WILL & CO., a partnership, and JAMES GILLIGAN and WILLIAM WILL,

Petitioners,

—v.—

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Before:

MEDINA, LUMBARD and BURGER,*

Circuit Judges.

Petition for review of an order of the Securities and Exchange Commission suspending the membership of petitioner, a registered broker-dealer partnership, in the National Association of Securities Dealers for five days, under § 15 of the Securities Exchange Act of 1934, 15 U. S. C. § 78(o) for violations of § 5 of the Securities Act of 1933, 15 U. S. C. § 77e, and naming the partners as the cause of the suspension.

Affirmed.

*Sitting by designation pursuant to 28 U. S. C. §291(a).

FRANCIS J. PURCELL, New York, N. Y. (Townsend & Lewis, New York, N. Y., on the brief), *for petitioners.*

DANIEL J. McCAULEY, JR., Associate General Counsel, Securities and Exchange Commission, Washington, D. C. (Thomas G. Meeker, General Counsel, Joseph B. Levin, Assistant General Counsel and Richard Pearl, on the brief), *for respondent.*

LUMBARD, *Circuit Judge*:

The question for decision is whether Gilligan, Will & Co. and its partners, James Gilligan and William Will, were underwriters with respect to the distribution of Crowell-Collier Publishing Company securities and as such wilfully violated the Securities Act of 1933, as amended, 15 U. S. C. § 77(a) *et seq.*, by acquiring and distributing debentures and common stock which were not registered. For reasons which are discussed below, this question turns on whether the issue was a "public offering" as those words are used in the Act, 15 U. S. C. § 77d.

For their activities with respect to these debentures and stock the Securities & Exchange Commission, pursuant to § 15 of the Securities Exchange Act of 1934, 15 U. S. C. § 78(o), instituted a proceeding to determine whether the petitioners had violated the 1933 Act and whether Gilligan, Will & Co.'s registration as a broker-dealer under the 1934 Act should be revoked. The facts were stipulated, a hearing was waived, and the Commission heard oral argument. It thereafter ordered that Gilligan, Will & Co. be suspended from membership in the National Association of Securities Dealers, Inc. for five days, and found that James Gilligan and William Will were each a cause of the order.

The partnership and the partners petition for a review of the Commission's order claiming that its action was arbitrary and capricious in four respects: (1) that its finding that petitioners were underwriters with respect to 1955 and 1956 transactions in Crowell-Collier debentures and stock was not supported by substantial evidence; (2) that the findings of wilful violation of the registration provision was unsupported by substantial evidence; (3) that the suspension of Gilligan, Will & Co. was arbitrary, capricious and an abuse of discretion; and (4) that they were denied an impartial hearing because the Commission had predetermined the matter by a press release issued before the hearing.

We hold that there was substantial evidence to justify the findings and conclusions of the Commission that the issue was a public offering and that petitioners were underwriters, and we agree that the registrant's suspension for wilful violation was proper. As the petitioners proceeded to trial without claiming prejudice from the Commission's press release, applying for an adjournment of the hearing and determination, or otherwise presenting their claims of pre-judgment to the Commission, they are foreclosed from complaining of this now. Section 25(a), Securities Exchange Act of 1934, 15 U. S. C. § 78y. Accordingly, we affirm the Commission's order.

The principal and essential purpose of the 1933 Act is to protect investors by requiring registration with the Commission of certain information concerning securities offered for sale. *A. C. Frost* v. *Coeur d' Alene Mines Corp.*, 312 U. S. 38, 40 (1941). For reasons which will be developed, the crucial provisions of law in this case are § 5 of the 1933 Act, 15 U. S. C. § 77e, which makes it unlawful for anyone, by any interstate communication or use of the mails, to sell or deliver any security unless a registration statement is in effect; and § 4(1), 15 U. S. C. § 77d(1), which exempts from this prohibition "transac-

tions by any person other than issuer, underwriter, or dealer" and "transactions by any issuer not involving any public offering."[1]

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1. Section 77e in relevant part provides:

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instrument of transportation, any such security for the purpose of sale or for delivery after sale.

* * * * *

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title."

Section 77d in relevant part provides:

"The provisions of section 77e of this title shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter and transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever

Since the Commission's proceeding was had on stipulated facts the only question is whether it was justified in drawing from them the inferences and conclusions of which the petitioners complain, principally that the petitioners were underwriters and that the issue was a public offering. To examine these inferences and conclusions we must state in some detail the facts concerning the issuance of the unregistered debentures and common stock of Crowell-Collier Publishing Company.

On July 6, 1955, Elliott & Company agreed with Crowell-Collier to try to sell privately, without registration, $3,000,000 of Crowell-Collier 5% debentures, convertible at any time into common stock at $5 a share, and the Elliott firm received an option on an additional $1,000,000 of Debentures. Edward L. Elliott, a partner in Elliott & Company, advised Gilligan, one of the two partners of the registrant, Gilligan, Will & Co., of this agreement. He told Gilligan that Gilligan could purchase, but only for investment, as much of the $3,000,000 as he wished, with the exception of $500,000 which Elliott's wife was taking, and that the debentures not taken by Gilligan would be offered to certain friends of Elliott. Gilligan was told by Elliott that Crowell-Collier had "turned the corner" and was then operating on a profitable basis. Elliott also said that the attorneys for Crowell-Collier and his lawyers had stated that the placement was an exempt transaction. Gilligan agreed to purchase $100,000 of debentures for his own account. It does not appear that Gilligan had any information regarding Crowell-Collier and the debenture issue other than what Elliott told him as summarized above.

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is later (excluding in the computation of such forty days any time during which a stop order issued under section 77h of this title is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter."

On August 10, 1955 the $100,000 debentures were delivered to Gilligan, Will & Co., which sent a letter to Crowell-Collier stating: "that said debentures are being purchased for investment and that the undersigned has no present intention of distributing the same."

Nevertheless, by August 10, 1955, almost half of the $100,000 of debentures had already been resold. Either on July 6 or July 7, 1955, Louis Alter, a member of the American Stock Exchange, agreed to buy $45,000 of the debentures. Gilligan also offered $10,000 to a friend and when this was not accepted he sold $5,000 to Michael D. Mooney, who had previously requested that amount of debentures and had been told that none were available; the remaining $5,000 debentures were placed in the registrant's trading account. In early September, when the securities were distributed, Gilligan, Alter and Mooney each signed a statement reading: "I hereby confirm to you that said debentures are being purchased for investment and that I have no present intention of distributing the same."

In May 1956, after Gilligan noticed that the advertising in Crowell-Collier magazines was not increasing, he decided to convert his debentures into common stock and to sell the stock. He advised Alter of his plans and on May 15, 1956 the registrant, Gilligan and Alter converted their debentures into common stock. Later in May they sold the stock at a profit on the American Stock Exchange. The stock had been listed on that Exchange since October 1955, and Gilligan became the specialist in the stock.

In May 1956 Gilligan, Will & Co. also purchased and participated in the sale of additional debentures by Crowell-Collier. Elliott told Gilligan that he was surrendering to Crowell-Collier his option on the remaining $1,000,000 of debentures, and that these debentures were to be sold at 160% of par, based on the stock's price at that time of $8 per share. The proceeds of the sale,

Elliott stated, were to be used by Crowell-Collier in the acquisition of certain television stations which would show a profit of $4,000,000 annually. Elliott also told Gilligan that Crowell-Collier would sell him, Elliott, 100,000 stock purchase warrants at 1¢ each, exercisable at $10 per share for five years. Gilligan agreed to take $150,000 face amount debentures and said he would see whether Alter was interested in taking any. After Alter indicated that he wanted $50,000 face amount, Gilligan advised Elliott that the total subscription would be $200,000. Gilligan did not inform Elliott of his and Alter's sales of stock obtained from the conversion of the debentures purchased in 1955.

On May 29, 1956 the registrant subscribed to $200,000 face amount debentures and issued to Alter a confirmation for $50,000 debentures which stated: "we have this day subscribed for your account and risk; over the counter as agents * * *" Alter immediately converted his debentures into stock. On the same day the registrant similarly confirmed $150,000 face amount debentures to a joint specialist's account maintained by it and one Lloyd E. Howard, which debentures were immediately converted into common stock.

In addition, on May 29, the registrant sent Crowell-Collier a letter signed by Will, confirming that $200,000 of debentures were purchased for investment with no present intention to distribute. Howard and Alter made similar representations on copies of the confirmations issued to them by the registrant.

Late in May 1956, Elliott informed Gilligan that $200,000 of debentures were still unsold, that it was necessary to sell these debentures to one party, and that if Gilligan could find a purchaser, Elliott would sell him 50,000 stock warrants at 1¢ each. Gilligan contacted Harry Harris and told him that he would split his warrants with him if he, Harris, could find a purchaser for the debentures. Harris interested Value Line Special Fund, Inc., and Gilli-

gan told Harris to contact Elliott. On May 29, 1956, the Fund's representatives met with Crowell-Collier's president, Paul Smith, and Harris and Elliott, and the Fund later agreed to purchase $200,000 face amount debentures and 15,000 warrants. To accommodate Elliott, Gilligan, Will & Co., as principal sent a confirmation, signed by Will, covering the sale of the debentures to the Fund.

Gilligan, Will & Co. received $50,000 warrants from Elliott, some of which were sold to the Fund and some of which were given to nominees of Harris and others, the 20,000 warrants given to others being subsequently returned to Elliott at his request.

Gilligan, Will & Co. sent Crowell-Collier two investment intention letters, in the usual form, one covering the Fund's purchase of debentures and the other covering the 50,000 warrants received by registrant. The Fund, at the request of Gilligan, Will & Co. signed letters of investment intent covering the debentures and the warrants.

Petitioners assert that they were not "underwriters" within the meaning of the exemption provided by the first clause of § 4(1). Since § 2(1) 15 U. S. C. § 77b(1) defines an "underwriter" as "any person who has purchased from an issuer with a view to * * * the distribution of any * * * security" and since a "distribution" requires a "public offering," see H. R. Rep. No. 1838, 73d Cong., 2d Sess. (1934) at p. 41, the question is whether there was a "public offering." Petitioners, disclaiming any reliance on the exemption of the second clause of § 4(1) for "transactions by an issuer not involving any public offering," assert that whether there was a "distribution" must be judged solely by their own acts and intention, and not by the acts or intention of the issuer or others. In other words they claim that whether the total offering was in fact public, their purchases and resales may be found to be exempt on the ground that they were not underwriters if their own resales did not amount to a public offering.

In the view we take of this case we need not decide whether, if the petitioners had purchased with a view to only such resales as would not amount to a distribution or public offering, their acts would be exempt even though the issue was in fact a public offering. We find that the resales contemplated and executed by petitioners were themselves a distribution or public offering as the latter term has been defined by the Supreme Court, and we therefore find that petitioners were underwriters and that their transactions were not exempt under § 4(1).

In *S. E. C.* v. *Ralston Purina Co.*, 346 U. S. 119 (1953), the Supreme Court considered the exemptions provided by § 4(1). Two of its holdings are significant here. First, it held that an issuer who claims the benefit of an exemption from § 5 for the sale of an unregistered security has the burden of proving entitlement to it. The rationale of this result applies as well to a broker-dealer who claims the benefit of a similar exemption. We therefore find that the burden was upon the petitioners to establish that they were not underwriters within the meaning of § 4(1).

The Court also defined the standard to be applied in determining whether an issue is a public offering. It held that the governing fact is whether the persons to whom the offering is made are in such a position with respect to the issuer that they either actually have such information as a registration would have disclosed, or have access to such information. 346 U. S. at 125-127. The stipulation of facts here expressly states that the purchasers "were not supplied with material information of the scope and character contemplated by the Securities Act nor were the purchasers in such a relation to the issuer as to have access to such information concerning the company and its affairs." Such a stipulation, which from the additional stipulated facts, appears equally applicable to Gilligan, the registrant, Alter, Mooney and Mrs. Elliott, concedes the very proposition of which the petitioners had to estab-

lish the negative in order to prevail, and we therefore think it dispositive of the question whether petitioners "purchased * * * with a view to * * * distribution."

Petitioners argue, however, that the definition of the *Ralston Purina* case is not exclusive, and that there is an exception to the standard there announced for cases in which the number of offerees or purchasers is small. In reliance on such a standard they assert that the stipulation discloses the existence of only four specific purchasers, and that therefore the Commission was bound to determine on this record that the petitioners' transactions were exempt because the issue was not public. We do not agree.

First, we think that the *Ralston Purina* case clearly rejected a quantity limit on the construction of the statutory term, and adopted instead the test set out above under which this issue was a public offering. It stated that "the statute would seem to apply to a 'public offering' whether to few or to many," 346 U. S. at 125, and cited with approval the dictum that "anything from two to infinity may serve: perhaps even one * * * " 346 U. S. 125 and n. 11. Second, even were this not the case, and if a numerical exemption existed despite an admitted violation of the *Purina* standard, the stipulation adequately discloses that Gilligan well knew that the sales to Elliott's wife and to and through the registrant were not the only sales that were contemplated. It is stipulated that "Elliott advised Gilligan that * * * Elliott was * * * going to sell as much as was left to certain of his friends" after Gilligan took what he wanted of the $2,500,000 remaining after Elliott's wife took $500,000.

Thus these petitioners, who now assert an exemption based on the small number of resales that they contemplated and made, were admittedly aware that the actual placement involved many others. At the least, to establish entitlement to any numerical exemption in such circumstances the petitioners would have to establish a reasonable and bona

fide belief that the total number involved in the placement would remain within the exemption. Otherwise although a general public placement could be effected by a series of transfers to small numbers of buyers, each distributor would be entitled to an exemption on the ground that it transferred to only a small number of buyers. The stipulation reveals that without any knowledge of the actual number of sales then consummated or contemplated the petitioners effected what they now claim to be a harmless number of resales. Such a record does not require and would not justify a finding that the petitioners had sustained their burden of proving entitlement to an exemption based on the size of the contemplated distribution.

The petitioners separately attack the finding that the registrant was an underwriter on the ground that the stipulation reveals that Gilligan agreed with Elliott that Gilligan would take the $100,000 for his own account and thus it requires the conclusion that the registrant did not participate. But the stipulation also reveals that Will received the debentures on behalf of the registrant and also on its behalf issued an investment intention letter, and that $5,000 were placed in the firm trading account. On such facts the Commission was justified in concluding that the registrant participated in the acquisition and distribution of the unregistered issue.

The Commission also found that "The sales by Gilligan and registrant of the underlying common stock on the American Stock Exchange in May 1956, clearly constituted a public distribution." Petitioners contest this conclusion on the ground that since the conversion and sales occurred more than ten months after the purchase of the debentures the Commission was bound to find that the debentures so converted had been held for investment, and that the sales were therefore exempt under § 4(1) since made by a person other than an issuer, underwriter or dealer. Petitioners concede that if such sales were intended at

the time of purchase, the debentures would not then have been held as investments; but it argues that the stipulation reveals that the sales were undertaken only after a change of the issuer's circumstances as a result of which petitioners, acting as prudent investors, thought it wise to sell. The catalytic circumstances were the failure, noted by Gilligan, of Crowell-Collier to increase its advertising space as he had anticipated that it would. We agree with the Commission that in the circumstances here presented the intention to retain the debentures only if Crowell-Collier continued to operate profitably was equivalent to a "purchase * * * with a view to * * * distribution" within the statutory definition of underwriters in § 2(11). To hold otherwise would be to permit a dealer who speculatively purchases an unregistered security in the hope that the financially weak issuer had, as is stipulated here, "turned the corner," to unload on the unadvised public what he later determines to be an unsound investment without the disclosure sought by the securities laws, although it is in precisely such circumstances that disclosure is most necessary and desirable. The Commission was within its discretion in finding on this stipulation that petitioners bought "with a view to distribution" despite the ten months of holding.

It is unnecessary, in the light of our decision sustaining the findings of the Commission as to violations with regard to the 1955 debentures, separately to consider the violations of § 5 found by the Commission as to the issue in 1956. Finally on the stipulation there is no doubt either that the Commission was justified in finding that the petitioners' acts were "wilful" within the meaning of § 15(b) of the Securities Exchange Act of 1934, see, e.g., *Hughes* v. *S. E. C.*, 174 F. 2d 969, 977 (D. C. Cir. 1949), or that the penalty imposed was within the Commission's discretion, see, e.g., *American Power & Light Co.*, v. *S. E. C.*, 329 U. S. 90, 112 (1946).

The petitioners raise the additional objection that they were denied the kind of hearing which they are guaranteed by the due process clause of the Fifth Amendment and § 5 of the Administrative Procedure Act in that the Commission prejudged their guilt in advance of the hearing. It is undisputed that the Commission issued a press release on August 12, 1957, three days after its order commencing these proceedings was issued, in which it stated that the brokers-dealers involved in the distribution of the unregistered Crowell-Collier debentures and stock had violated § 5 of the Securities Act of 1933. While the petitioners were not mentioned by name in the release, it is undisputed that it referred to them, among others.

We agree with the Commission that the failure of petitioners to assert the defect of prejudgment before the Commission once the release was available to them amounted to a waiver of the objection under § 25(a) of the 1934 Act, 15 U. S. C. § 78y, which provides that no objection to the Commission's orders shall be considered by an appellate court "unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure to do so." No reason is given by the petitioners for their failure to object during the proceedings below.

The petitioners have relied here on the refusal of Commissioner Sargent to participate in the proceedings on the ground, which he stated in a separate opinion, that he had reached "a definitive conclusion of law upon findings of fact on August 12, 1957, which antedated the institution of these proceedings," as a result of his participation in the release. While we of course express no opinion on the correctness of Commissioner Sargent's assertion that § 5 of the Administrative Procedure Act does not permit such participation as occurred here by the Commission itself in both the release and subsequent proceedings, we think it appropriate to express our doubts whether such participation was either necessary or desirable.

Apart from § 5 and the restrictions it may impose, the Commision's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. There would appear to be no such conflict between the Commission's duty to inform the public and its duty to prosecute as would necessitate the use of press releases of the kind here questioned.

The order of the Commission is affirmed.

Order

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 25171

GILLIGAN, WILL & CO.,
a partnership,
and
JAMES GILLIGAN and WILLIAM WILL,
Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

Gilligan, Will & Co., James Gilligan and William Will having filed a petition to review, annul and set aside an order entered by the Securities and Exchange Commission on May 7, 1958 pursuant to Section 15A of the Securities

Exchange Act of 1934, suspending Gilligan, Will & Co. from membership in the National Association of Securities Dealers, Inc. for a period of five days beginning at the opening of business on May 19, 1958, and finding that James Gilligan and William Will are each a cause of this suspension;

This Court having granted on May 16, 1958 a stay of aforesaid order of the Securities and Exchange Commission pending final determination of this matter by this Court;

Briefs having been filed by the parties, this Court having heard argument and having issued its opinion on June 3, 1959; on the basis of said opinion, it is hereby

ADJUDGED, ORDERED AND DECREED that the aforesaid order of the Securities and Exchange Commission be and it hereby is affirmed and the Commission shall fix the time for the commencement of its aforesaid order of suspension.

By the Court:

S/ HAROLD R. MEDINA
Circuit Judge

S/ J. EDWARD LUMBARD
Circuit Judge

Date: June 25, 1959

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	12

CITATIONS

Cases:

Securities and Exchange Commission v. *Chinese Consolidated Benevolent Ass'n*, 120 F. 2d 738, certiorari denied, 314 U.S. 618 — 8

Securities and Exchange Commission v. *Culpepper* (C.A. 2), decided September 10, 1959 — 8

Securities and Exchange Commission v. *Ralston Purina Co.*, 346 U.S. 119 — 6, 8, 9, 10, 11

Statutes:

Securities Act of 1933, as amended:

Section 2(11) (15 U.S.C. 77b(11)) — 2, 6

Section 4(1) (15 U.S.C. 77d(1)) — 2, 6, 8, 9, 11

Section 5(a) (15 U.S.C. 77e(a)) — 3, 5, 6, 7

Section 5(c) (15 U.S.C. 77e(c)) — 3, 5, 6, 7

Securities Exchange Act of 1934:

Section 15(b) (15 U.S.C. 78o(b)) — 2

Section 15A (15 U.S.C. 78o–3) — 2

Section 15A (l) (2) (15 U.S.C. 78o–3(l)(2)) — 2

Section 15A(b)(4) (15 U.S.C. 78o–3(b)(4)) — 2

Miscellaneous:

H.R. 5480, 73d Cong., 1st Sess. — 10

H. Rep. No. 85, 73d Cong., 1st Sess.:

p. 8 — 10

pp. 15–16 — 11

528586—59

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 422

GILLIGAN, WILL & CO., A PARTNERSHIP, JAMES GILLIGAN AND WILLIAM WILL, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 267 F. 2d 461 (App. 1a–14a).[1] The Findings and Opinion and Order of the Securities and Exchange Commission are set forth in Securities Exchange Act Release No. 5689 (R. 1a, 21a–33a).

JURISDICTION

The order of the court of appeals was entered on June 25, 1959 (App. 14a). The petition for a writ

[1] References to the appendix to the petition will be cited as "App." References to the appendix to petitioners' brief in the court below will be cited as "R."

of certiorari was filed on September 23, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 4(1) of the Securities Act of 1933 exempts from registration "[t]ransactions by any person other than an issuer, underwriter, or dealer". The question presented is whether the court of appeals, in the particular circumstances of this case, erred in affirming the Commission's finding that petitioners had failed to sustain their burden of proving that they had not participated in a distribution or public offering of securities and therefore were not underwriters within the meaning of Section 2(11) of the Act.

STATUTE INVOLVED

Relevant provisions of the Securities Act of 1933, 15 U.S.C. 77a, *et seq.*, are set forth in the petition at pp. 2–4.

STATEMENT

The Securities and Exchange Commission instituted a proceeding pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934, 15 U.S.C. 78*o*(b) and 15 U.S.C. 78*o*–3,[1] to determine whether petitioners

[1] Sections 15(b) and 15A(l)(2) provide respectively that the Commission shall revoke the registration of a broker or dealer, or suspend or expel any member from a registered securities association, for a willful violation of the Securities Act of 1933 where necessary or appropriate in the public interest. Section 15A(b)(4) provides that, in the absence of approval or direction by the Commission, no broker or dealer may continue as a member of a registered securities association if such broker or dealer or partner thereof was the cause of any such revocation, suspension or expulsion which is in effect.

had wilfully violated Section 5 (a) and (c) of the Securities Act of 1933, 15 U.S.C. 77e (a) and (c)[1] and whether therefore to revoke the registration of petitioner Gilligan, Will & Co., as a broker and dealer, whether to suspend or expel it from membership in the National Association of Securities Dealers, Inc., and whether petitioners James Gilligan and William Will, partners in the firm, were each a cause of any order of revocation, suspension or expulsion which might be entered (R. 4a–7a). The Commission subsequently entered an order suspending the Gilligan, Will firm from membership in the Association for a period of five days, and finding that petitioners Gilligan and Will were each a cause of the suspension (R. 1a). In its accompanying Findings and Opinion (R. 21a–33a), the Commission found that the firm and Gilligan had willfully violated Section 5 (a) and (c) by acting as underwriters in the public offering of unregistered securities, and that remedial action was appropriate in the public interest and for the protection of investors.

The underlying facts were stipulated (R. 8a–19a; see R. 23a–26a; App. 5a–8a). On July 6, 1955, Edward L. Elliott, a partner in the securities firm of Elliott & Company, agreed with the Crowell-Collier Publishing Company to try to sell privately, without registration, $3,000,000 of Crowell-Collier 5% debentures, convertible at any time into common stock at

[1] Section 5 (a) and (c) make it unlawful for anyone by interstate transportation or communication or by use of the mails to sell or deliver a security unless a registration statement is in effect, or to offer to sell a security unless a registration statement has been filed.

$5 a share, and the Elliott firm received an option on an additional $1,000,000 of debentures. Elliott advised petitioner Gilligan of this agreement and told him that Gilligan could purchase, but only for investment, as much of this offering as he desired, with the exception of $500,000 which Elliott's wife was taking, and that the debentures not taken by Gilligan would be offered to certain friends of Elliott. Elliott also told Gilligan that Crowell-Collier had "turned the corner" and was then operating on a profitable basis, and that the attorneys for Crowell-Collier and the Elliott firm had stated that the placement was an exempt transaction. Gilligan agreed to purchase $100,000 of debentures for his own account.

On or about August 10, 1955, these debentures were delivered to the petitioner Gilligan, Will firm. Petitioner Will, on behalf of the firm, executed a letter to Crowell-Collier stating that "* * * said debentures are being purchased for investment and that the undersigned has no present intention of distributing the same." As a matter of fact, however, by August 10, 1955, almost half of the $100,000 of debentures had already been resold. On July 6 or July 7, 1955, Gilligan had resold $45,000 of the participation to Louis Alter, a member of the American Stock Exchange. At about the same time Gilligan had also offered $10,000 of debentures to a friend, and when this sale did not materialize he sold $5,000 to another friend, Michael D. Mooney, who had previously requested that amount of debentures and had been told none were available; the remaining $5,000 face amount of this block was placed in the firm's trading account. When

the securities were delivered, Gilligan, Alter, and Mooney each signed a statement that the debentures were being purchased for investment. In May 1956, after Gilligan noticed that the advertising in the Crowell-Collier magazines was not increasing, he informed Alter that he had decided to convert his debentures into common stock and sell the stock. Between May 7 and 24, Gilligan, the Gilligan, Will firm, and Alter converted their debentures into stock which they sold at a profit on the American Stock Exchange. Notwithstanding these sales, the Gilligan, Will firm, in the latter part of May, purchased and participated in the sale of additional debentures issued by Crowell-Collier.[4]

On the basis of the above stipulated facts, the Commission found that petitioners had violated Section 5 of the Securities Act of 1933 in the Crowell-Collier financing. The Commission, *inter alia,* observed (R. 31a):

> The situation presented here is one in which a registered broker-dealer and a partner in the firm, among other things, purchased a substantial amount of unregistered convertible debentures from the issuer with a view to selling some of them immediately to a few of the partner's friends and associates and with a view to making further sales of the debentures or the underlying stock to anyone if the issuer's prospects

[4] The Commission found that the petitioners' participation in the sale of these additional debentures issued by Crowell-Collier also violated Section 5 (a) and (c) of the Act (R. 31a). The court of appeals, however, found it unnecessary to consider this violation separately (App. 12a). For the facts on these sales, see App. 6a-8a.

> turned out to be less favorable than anticipated and in fact did make a public sale of such securities. Under these circumstances, we find that registrant and Gilligan purchased unregistered securities from an issuer with a view to distribution, did in fact participate in a distribution of such securities, and were statutory underwriters within the definition of Section 2(11) of the Securities Act.

The court of appeals upheld the order of the Commission on the ground that "there was substantial evidence to support the finding of the Commission that the issue was a public offering and that petitioners were underwriters * * *" (App. 3a) and that petitioners had failed to sustain their burden of proving the Section 4(1) exemption (App. 11a).

ARGUMENT

Petitioners claim that the Gilligan, Will firm sold securities issued by Crowell-Collier "to a limited number of persons able to fend for themselves" (Pet. 9); that under the decision of this Court in *Securities and Exchange Commission* v. *Ralston Purina*, 346 U.S. 119, such sales are not a public offering and therefore not a distribution; that, therefore, they were not underwriters within the meaning of Section 2(11) of the Securities Act of 1933 which defines an underwriter as any person who serves as an intermediary in "the distribution of any security"; and that since Section 4(1) of the Securities Act (15 U.S.C. 77d(1)) exempts "[t]ransactions by any person other than an issuer, underwriter, or dealer * * *," they did not violate Section 5 of that Act.

1. Petitioners' contentions rest exclusively on the premise that they did nothing more than effect sales to three "sophisticated" investors.[5] Their activities, however, were not so limited; consequently, the issue they present is hypothetical. The Commission found (R. 24a) that the firm, and Gilligan individually, sold substantial amounts of Crowell-Collier securities on a stock exchange. This finding, which the court of appeals affirmed (App. 6a, 12a) and which petitioners do not challenge, alone establishes that petitioners participated in a public offering and distribution of Crowell-Collier securities and therefore acted as underwriters in violation of Section 5.

For an offering to be non-public in character, it is clear that the purchasers, no matter how limited their number or how intimate their knowledge of the issue, must take the securities for investment. Unless a bona fide intent to hold the securities barring unusual circumstances is required, it is obvious that a ready method would be afforded for thwarting the policy of the law and evading its provisions. Applying this principle to the facts here, the court of appeals declared (App. 12a):

> We agree with the Commission that in the circumstances here presented the intention to

[5] Thus, petitioners state the issue presented to this Court as (Pet. 2):

> Whether the sale of securities, previously purchased from an issuer, to three sophisticated purchasers, one no more than an offeree, for investment, constitutes a distribution or public offering, thereby constituting the seller an underwriter within the definition in Section 2(11) of the Securities Act of 1933, as amended.

> retain the debentures only if Crowell-Collier continued to operate profitably was equivalent to a "purchase * * * with a view to * * * distribution" within the statutory definition of underwriters in § 2(11). To hold otherwise would be to permit a dealer who speculatively purchases an unregistered security in the hope that the financially weak issuer had, as is stipulated here, "turned the corner," to unload on the unadvised public what he later determines to be an unsound investment without the disclosure sought by the securities laws, although it is in precisely such circumstances that disclosure is most necessary and desirable.

The record amply demonstrates that the petitioners served as a channel for the distribution of Crowell-Collier securities. In these circumstances the Section 4(1) exemption for persons other than issuers, underwriters, or dealers has no application. As was pointed out in *Securities and Exchange Commission* v. *Chinese Consolidated Benevolent Ass'n*, 120 F. 2d 738, 741 (C.A. 2), certiorari denied, 314 U.S. 618:

> Section 4(1) was intended to exempt only trading transactions between individual investors with relation to securities already issued and not to exempt distributions by issuers.

See also *Securities and Exchange Commission* v. *Culpepper* (C.A. 2), decided September 10, 1959.

2. As we have shown above, petitioners' only contention—that under the principles of *Ralston Purina, supra,* the sale of securities to three "sophisticated" investors is not a public offering—is a hypothetical

issue not presented by this case. In any event, the decision of the Commission, affirmed by the court of appeals, is entirely consistent with *Ralston Purina*.[6]

The term public offering, which is not defined in the statute, was considered by this Court in *Ralston Purina* in construing the exemption in Section 4(1) of the Securities Act for "transactions by an issuer not involving any public offering". The Court held that, in view of the "broadly remedial purposes" of the statute to disclose pertinent information for investors concerning securities offered for sale, the burden of proof is on the claimant of the exemption. 346 U.S. at 126. The Court then went on to hold that, since "the exemption question turns on the knowledge of the offerees, * * * [t]he focus of inquiry should be on the need of the offerees for the protections afforded by registration. The employees here [who were being offered stock in their own employer] were not shown to have access to the kind of information which registration would disclose." *Id.* at 126–127.

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[6] Moreover, the court of appeals held that the size of the distribution by a particular person buying for resale purposes must be measured by the entire placement, at least where he knows that the placement involves many other sales: "Otherwise although a general public placement could be effected by a series of transfers to a small number of buyers, each distributor would be entitled to an exemption on the ground that it transferred to only a small number of buyers" (App. 11a). Since, the court found, Gilligan had known that Elliott was going to sell part of the 1955 issue to some of Elliott's friends, petitioners failed to prove that they were entitled to an exemption based on the number of offerees of the contemplated distribution (App. 10a–11a).

Petitioners, nevertheless, claim that under *Ralston Purina,* even if the offerees do not have access to the requisite information, "[a]n offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering.'" 346 U.S. at 125. This statement in *Ralston Purina* is the touchstone of petitioners' entire argument which essentially resolves itself to the proposition that Congress intended to withhold the disclosures provided for in the statute from "sophisticated" investors even when they were uninformed about the security being sold and had no access to information.[7] It would appear clear, however, that in speaking of offerees "able to fend for themselves" this Court meant only that there was no practical need to provide offerees with the disclosure required by the Act when they otherwise had access to such information. As we have already noted (*supra,* p. 9), it was precisely because the issuer in the *Ralston Purina* offering had not demonstrated that the offerees had access to information that the exemption was unavailable. And the Court pointed out that even an offering limited to

[7] This is to be contrasted with the Congressional concern that even persons in the securities business were compelled "* * * to make commitments blindly", a condition which the Act was intended to correct. H. Rep. No. 85, 73d Cong., 1st Sess., p. 8, which accompanied H.R. 5480, the bill that became the Securities Act.

executive personnel of an issuer is exempt only if the executive personnel "because of their position have access to the same kind of information that the Act would make available in the form of a registration statement." *Id.* at 125–126.[8]

Thus, under the holding of this Court in *Ralston-Purina*, petitioners' stipulation (R. 18a)—that the purchasers here were neither supplied with, nor had access to, information of the scope and character which would have been afforded by registration—is dispositive that petitioners participated in a public offering. As the court of appeals held, the stipulation "* * * concedes the very proposition of which the petitioners had to establish the negative in order to prevail * * *" (App. 9a–10a).

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[8] Petitioners refer to language in H. Rep. No. 85, 73d Cong., 1st Sess., pp. 15–16. The quotation when correctly stated offers no comfort to petitioners for it states that the Section 4(1) exemption would "permit an issuer to make a specific or an isolated sale of its securities to a particular person * * *." Insofar as the number of offerees is concerned, this Court observed in *Ralston Purina* that "the statute would seem to apply to a 'public offering' whether to few or many", and cited with approval a dictum in an English case that "[a]nything from two to infinity may serve: perhaps even one * * *." 346 U.S. 125 and n. 11.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorney,
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OCTOBER 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 422

GILLIGAN, WILL & CO., a Partnership,
JAMES GILLIGAN and WILLIAM WILL,
Petitioners,

against

SECURITIES AND EXCHANGE COMMISSION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY BRIEF TO THE SECURITIES AND EXCHANGE COMMISSION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

MANNING, HOLLINGER & SHEA,
Attorneys for Petitioners.

FRANCIS J. PURCELL,
Of Counsel.

INDEX

	PAGE
CITATIONS AND STATUTES	
Securities and Exchange Commission v. Ralston Purina, 346 U. S. 119	1, 2, 3, 4
Securities Act of 1933 as amended: (15 U. S. C. 77(a) *et seq.*)	
Section 2(11)	2
Section 4(1)	2, 3, 4

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REPLY BRIEF TO THE SECURITIES AND EXCHANGE COMMISSION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

In opposing the Petition for Writ of Certiorari the Commission relies on two arguments which, although treated with in the Petition, may require additional comment. In brief, the Commission concludes, contrary to fact, that the issue presented to this Court by Petitioners is "hypothetical" (Br. in Opp., pp. 7, 8) and that "[illegible] the decision of the Commission, affirmed by the Court of Appeals, is entirely consistent with *Ralston Purina*." (346 U.S. 119)

I. In the Petition, after pointing to the conflict between the lower Court's decision and the pertinent language of this Court in the *Ralston Purina* case, the question presented to this Court was set forth as follows:

> "Whether the sale of securities, previously purchased from an issuer, to three sophisticated purchasers,

one no more than an offeree, *for investment*, constitute a distribution or public offering, thereby constituting the seller an underwriter within the definition in Section 2(11) of the Securities Act of 1933, as amended. (Emphasis supplied.)

Petitioners were parties to complained of purchase and of sale transactions in July, 1956 and then, after a 10 month hiatus, to only sale transactions in May, 1957. The fact that the Court below looked at Petitioners' sale transactions in July, 1956 (those referred to in the "Question Presented" as quoted above) as separate and apart from the transactions 10 months later, is amply demonstrated in its finding that the July, 1956 "* * resales * * were themselves a distribution or public offering as the latter term has been defined by the Supreme Court, and we therefore find that petitioners were underwriters and that their transactions were not exempt under §4(1)." (App. 9a)

In view of this holding it was argued in the Petition that the lower Court misconstrued the general standard of the *Ralston Purina* decision and ignored the integral "lend for themselves" portion thereof. There was nothing assumed without proof in the manifestly real issue submitted to this Court. What then is the basis for the "hypothetical" characterization ascribed.

As to the $100,000 of securities bought by Gilligan from the issuer in July, 1956, he retained $45,000 worth, placed $5,000 worth in his firm trading account and statutorily speaking, resold $45,000 worth to Alter, $5,000 worth to Mooney (after a first refusal) and *offered* a $10,000 portion to a "friend". Thus, there were in fact three buyers from Gilligan, unless the "friend" offeree be added to make the aggregate number four specific purchasers as stated in the opinion below. (App. 10a) As shown in the Stipulation of Facts, the three buyers from Gilligan were by identification and description clearly "sophisticated" and consti-

tuted a class of persons able to fend for themselves. (Vol. II, App., pp. 11a-19a)

2. The Commission argues in opposition that its decision, affirmed by the lower Court, is entirely consistent with *Ralston Purina*. In addressing itself to Petitioners' argument that this Court clearly intended its "fend for themselves" language as other than *obiter dicta*, goes on to interpret said argument in the premises as resolving " itself to the proposition that Congress intended to withhold the disclosures provided for in the statute from 'sophisticated' investors even when they were uninformed about the security being sold and had no access to information." (Br. in Opp., p. 10) Clearly, no such result or resolve can be said to have been implied or even conjured in the Pefition. It was simply pointed out that the lower Court in its paraphrase of the public offering or distribution test of *Ralston Purina* misinterpreted the full standard when it stated:

> " * * the 'governing fact' in determining a public offering 'is whether the persons to whom the offering is made are in such a position with respect to the issuer that they either actually have such information as a registration would have disclosed or have access to such information' * * *".

This may be called the "have knowledge—or—access thereto" test which, while not outside the full standard in *Ralston Purina* is certainly not exhaustive thereof as is seen when the following statement from the *Ralston Purina* case is considered:

> "The natural way to interpret the private offering exemption is in the light of the statutory purpose. Since exempt transactions are those as to which 'there is no practical need for (the bill's) application,' *the applicability of § 4 (1) should turn on whether a par-*

ticular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering.' " (Emphasis ours) (346 U.S. 124-125)

Thus, while the question may turn on the knowledge or access test, it may also turn on the "needs" test.

Finally the Commission argues that:

"* * * It would appear clear, however, that in speaking of offerees 'able to fend for themselves' this Court meant *only* that there was no practical need to provide offerees with the disclosure required by the Act when they otherwise had access to such information. * * *" (Emphasis supplied) (Br. in Opp., p. 10).

While the Commission may narrow its focus to adopt its interpretation of the "clear" meaning of the Court's language as quoted above, it is nonetheless manifest from said language and the manner in which this Court accented its "needs" test that such was an integral and important factor to be considered in determining the question of public offering or distribution. This Court's position is abundantly clear that where it is demonstrated that the "need for (the Bill's) application" is absent, the offeree or buyer, in the context of § 4(1), is not public.

It is therefore respectfully submitted that the issue outlined by Petitioners is real and not hypothetical and that the opinion of the Court below is in conflict with the opinion of this Court.

Respectfully submitted,

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